

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MB Docket No. 05-279
Table of Allotments)	RM-11276
FM Broadcast Stations.)	
)	
(Old Forge and Black River, New York))	

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JAN 10 2006

To: Office of the Secretary, to forward to
Assistant Chief (Allocations), Audio Division

Federal Communications Commission
Office of Secretary

REPLY COMMENTS

Radioactive, LLC ("Radioactive"), the holder, pursuant to the winning bid in Auction No. 37, of a construction permit to build a new FM station on Channel 223A, Old Forge, New York, FCC File No. BNPH-20050103AFU (Facility ID No. 164250) (the "Permit"), by its attorneys, hereby files these Reply Comments in support of the Notice of Proposed Rule Making in the above-captioned proceeding, DA 05-2906 (released November 4, 2005) (the "NPRM").

Radioactive filed on June 8, 2005, a Petition for Rulemaking (the "Petition"), proposing to: (a) modify the FM Table of Allotments, Section 73.202 of the Commission's Rules, to (i) delete Channel 223A from Old Forge, New York, and (ii) add Channel 223A to Black River, New York; and (b) modify Radioactive's unconstructed Permit to specify operation on Channel 223A at Black River, New York, in lieu of Channel 223A at Old Forge, New York (the "Proposal").

As noted in Radioactive's Petition, Black River is an incorporated village, designated in the U.S. Census (with a 2000 U.S. Census population of 1,285 persons), and therefore qualifies as a community for allotment purposes.

Black River is governed by a Village Board, has its own sewer and water services, volunteer fire department, churches, and numerous local businesses. As confirmed by the Bureau in the *NPRM*, the predicted 70 dBu contour of the proposed Channel 223A allotment at Black River does not trigger a *Tuck* 1/ analysis because Black River is not located in an Urbanized Area, nor does the signal encompass 50 percent or more of an Urbanized Area. 2/ In the *NPRM*, the Bureau found that the Proposal "warrants consideration because it would provide Black River with a first local service." 3/ Moreover, citing allocations precedent, the Bureau stated: "We recognize that the construction permit for Channel 233A at Old Forge is not constructed and that the loss of a potential service does not raise the same level of concern as that of an existing service." 4/

By timely-filed Comments dated December 23, 2005, Radioactive affirmed its support of the Proposal and certified that it will apply for the allotment if changed as proposed in the *NPRM*.

1/ See *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988).

2/ *NPRM* at ¶ 2.

3/ *Id.* at ¶ 3.

4/ *Id.* (citing *Pelham and Meigs, Georgia*, 18 FCC Rcd 12187 (MB 2003)). See also Petition at n.13 (citing *Chatom and Grove Hill, Alabama*, 12 FCC Rcd 7664 (MMB 1997); *Bagdad and Chino Valley, Arizona*, 11 FCC Rcd 523 (MMB 1995)).

By Comments shown as received by the Commission on the filing deadline, December 27, 2005, Clancy–Mance Communications, Inc. (“Clancy–Mance”), the licensee of WATN(AM), Watertown, New York, and WTOJ(FM), Carthage, New York, opposed the reallocation proposal based on its concern that the reallocated station “would compete with WATN and WTOJ for audience and revenue in the Watertown radio market.” 5/

Clancy–Mance asserts in its Comments that the conclusion that the Proposal would not result in the loss of existing local transmission service or aural reception service at Old Forge is only “technically” correct because the station is not yet on the air. That of course, is the point of case precedent such as *Pelham and Meigs, Georgia*. Clancy–Mance nevertheless alleges that the Proposal would result in a loss of “first FM reception” service to a population of 2,248 persons. 6/ Clancy–Mance urges that this “critical” loss of allegedly potential service should be the basis for deviating from precedent and rejecting the Proposal.

Not only is a “first FM service” not an allotment priority superior to a first local transmission service, 7/ but Clancy–Mance’s argument is based on

5/ Clancy–Mance Comments at ¶ 1.

6/ Clancy–Mance bases this “first FM service” figure on a theoretical operation at maximum Class A facilities from the Channel 223A Old Forge reference coordinates, not on the facilities authorized in the Permit. See Clancy–Mance Comments at Engineering Statement.

7/ As set forth in the *NPRM* at n. 4, the FM Allotment priorities are: (1) first full-time aural service, (2) second full-time aural service, (3) first local service, (4) other public interest matters. [Co-equal weight is given to given to priorities (2) and (3)]. See *Revision of FM Assignment Policies and Procedures*, 90 FCC2d 88, 91 (1988).

unrealistic theoretical maximum Class A facilities at the Old Forge reference coordinates. As affirmed in the attached Declaration, the Old Forge facility presupposed by Clancy–Mance simply is not feasible. This unworkable presumption underscores the inherent fallacy of Clancy–Mance’s position.

Next, Clancy–Mance argues that the Proposal is contrary to Section 307(b) of the Communications Act of 1934, as amended, because, it claims, the station would be moved “into the urban Watertown market (albeit not technically defined as an Urbanized Area) that is presently well served by a number of stations.” 8/ Clancy–Mance obviously fails to see the irony in its assertion, on the one hand, that the lack of loss of service is merely “technically” true because there is no current service, while, on the other hand, asserting that Watertown should be treated like an Urbanized Area, even though it “technically” is not one! In any event, the precedent is quite clear: the Commission has adopted a “bright line” test that there is no *Tuck* analysis unless the community is located within an Urbanized Area or unless the station would or could encompass at least 50 percent of an Urbanized Area with its city–grade signal. 9/ Whether or not Clancy–Mance wishes

8/ Clancy–Mance Comments at ¶ 3.

9/ See e.g., *Mount Pleasant and Hemlock, Michigan*, DA 05-2901 at ¶ 10 (MB rel. Nov. 4, 2005) (“*Tuck* is only applied in cases where the proposed facilities would or could cover 50 percent or more of an Urbanized Area. This ‘bright line’ test. ‘ . . . strikes an appropriate balance between ensuring that rural stations do not migrate to urban areas in a manner inconsistent with the goals of Section 307(b) of the Communications Act and at the same time providing stations with the opportunity to change their communities of license, if this would serve the public interest.”) (citing *Headland, AL*, and *Chattahoochee, FL*, 10 FCC Rcd 10352, 10354 (MMB 1995)).

it was otherwise, as it acknowledges, 10/ Watertown is not an Urbanized Area, and consequently, the Commission does not require a *Tuck* showing here.

Lastly, Clancy–Mance submits a letter from the Supervisor of the Town of Webb, and asserts that “The loss of this proposed radio station to the largest township in New York would be devastating to its future.” 11/ Rather than bolstering its case, this last argument only highlights how more deserving Black River is of a first local transmission service than is Old Forge. The Supervisor explains that Old Forge is just a Hamlet, which along with “[s]everal other Hamlets,” is part of the Town of Webb, indicating that Old Forge does not have a distinct governing body nor are government services provided by the Hamlet of Old Forge independent of the Town of Webb. In contrast, as set forth in the Petition, Black River is governed by a Village Board, comprised of a mayor, a deputy mayor, and several trustees, and employs a Village Clerk; moreover, the Village of Black River provides its residents with public services such as water and sewer, and the Village has its own volunteer fire department and ambulance squad.

Clancy–Mance then compares the populations of Black River and the Town of Webb, touting Webb’s higher count. 12/ But of course, this is not a matter involving an allotment to the Town of Webb, it is an allotment to Old Forge, so the

10/ Clancy–Mance Comments at ¶ 6.

11/ *Id.* at ¶ 5.

12/ *Id.* at ¶ 6.

comparison is besides the point. ^{13/} Since is it not listed in the Census, in contrast to Black River, Old Forge is not entitled to a presumption of community status for allotment purposes, nor is there reliable Census population data.

The Town of Webb Supervisor expresses concern that if Channel 223A is reallocated in this proceeding, there might not be an opportunity again for local transmission service. That concern is misplaced. Not only are there a plentitude of channels available for a new FM service at Old Forge, ^{14/} but Channel 231A at Old Forge is one of the channels being offered in upcoming Auction No. 62. ^{15/} Thus, there are ample opportunities for local transmission service at Old Forge besides Channel 223A.

In sum, as set forth in the *NPRM*, the Proposal would provide a first local transmission service to Black River, New York. Black River not only qualifies as a community for allotment purposes, but as a Census-recognized Village with a local government, it is superior to the non-Census designated Hamlet of Old Forge. Also as recognized in the *NPRM*, since the Permit is unconstructed, there would be

^{13/} As noted by its Supervisor, the Town of Webb includes several Hamlets, not just Old Forge. Indeed, besides Old Forge, Hamlets within the Town of Webb include: Beaver River, Big Moose, Eagle Bay, Keepawa, McKeever , Minnehaha, Moshier Falls, Stillwater, Thendara, and Woods Lake. *See* http://en.wikipedia.org/wiki/Webb%2C_New_York. Nor would Radioactive's Permit provide the requisite 70 dBu coverage to 80 percent of area of the Town of Webb. *See* attached Declaration.

^{14/} At a minimum, Channel 251A or 252A, plus Channel 263A or 265A, plus Channel 290A, 291A or 292A could be allotted to Old Forge in compliance with the Commission's rules. *See* attached Declaration.

^{15/} *See* Attachment A to DA 05-1598 (rel. June 17, 2005) (Channel 231A, Old Forge, New York is designated FM433).

no loss of service by this reallocation. Radioactive requests expedited action on this matter, so that it may obtain the requisite modification to its Permit (which expires on June 7, 2008) to effectuate the Proposal and promptly bring a first local transmission service to Black River, New York.

Respectfully submitted,

RADIOACTIVE, LLC

By:



Marissa G. Repp
Tarah S. Grant

HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, DC 20004-1109
(202) 637-5600

Its Attorneys

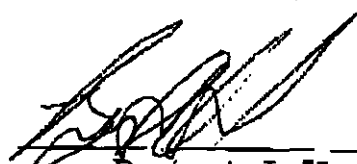
January 10, 2006

DECLARATION

I, Benjamin L. Homel, declare as follows:

1. I am President and Member of Radioactive, LLC ("Radioactive").
2. Radioactive continues to intend to apply to modify its construction permit, FCC File No. BNPH-20050103AFU (Facility ID No. 164250) (the "Permit"), to operate on Channel 223A at Black River, New York, upon adoption of the proposed rulemaking amending Section 73.202, Table of Allotments, FM Broadcast Stations (Old Forge and Black River, New York). If awarded the construction permit for Channel 223A at Black River, New York, Radioactive will promptly construct and operate such facilities.
3. I have reviewed the foregoing Reply Comments and hereby certify that the factual and technical statements made therein are true and accurate to the best of my knowledge, information and belief.
4. It is not feasible to construct maximum Class A facilities (6 kilowatts and 100 meters height above average terrain) at the Old Forge Channel 223A reference coordinates. Specifically, in order to construct such maximum Class A facilities at the reference coordinates, the center of radiation must be approximately at least 124 meters above ground level, which would require a tower of about 130 meters (or 425 feet) in height. The Town of Webb is located entirely within the Adirondack Park, so the zoning regulations make new tower construction very difficult; indeed another broadcaster with a translator in the area has been trying unsuccessfully for years to obtain permission to build a new tower in the Town of Webb. Radioactive specified an existing pole (with a radiation center above ground level of 9 meters) for its Permit with reduced power to meet RF radiation guidelines. Given the zoning restrictions in the area, Radioactive does not believe that a 130 meter tower would be authorized at the reference coordinates by the Town of Webb.
5. Radioactive's Permit as presently authorized would not provide a 70 dBu signal to 80 percent or more of the area of the Town of Webb, New York.
6. Based on the Commission's community of license coverage and minimum spacing requirements, I have identified, at a minimum, the following FM channels that could be allotted to Old Forge, New York, in compliance with the Commission's rules: Channel 251A or 252A; Channel 263A or 265A; Channel 290A, 291A or 292A.

I hereby declare under penalty of perjury that the statements made in this declaration are true and accurate to the best of my knowledge, information and belief.



Benjamin L. Homel

Executed this 9th day of January, 2006.

Certificate of Service

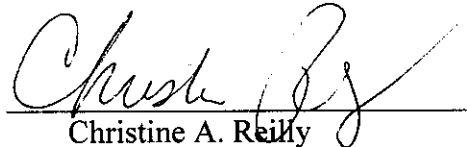
I, Christine A. Reilly, hereby certify that on this 10th day of January, 2006, a copy of the foregoing **Reply Comments** was sent by first-class mail, postage prepaid, to:

Peter H. Doyle, Chief*
Audio Division
Office of Broadcast License Policy
Media Bureau
Federal Communications Commission
445 – 12th Street, S.W.
Room 2A-320
Washington, DC 20554

John A. Karousos*
Assistant Chief, Audio Division
Media Bureau
Federal Communications Commission
445 – 12th Street, S.W.
Room 3A-266
Washington, DC 20554

Ms. Helen McLean*
Audio Division, Media Bureau
Federal Communications Commission
445 – 12th Street, S.W.
Room 2B-532
Washington, D.C. 20554

James L. Oyster, Esq.
Law Offices of JAMES L. OYSTER
108 Oyster Lane
Castleton, VA 22716-2829
Attorney for Clancy-Mance Communications, Inc.



Christine A. Reilly

* By Hand Delivery